

## OB Providers

### Am I required to report maternal drug use?

### Methodology

The information below provides detail about the methodology used to compile the information in the State law summary table. The information is broken into the following categories:

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#### Background

There is no uniformity amongst the states regarding the identification or reporting of suspected child abuse or neglect for a positive urine drug test result.<sup>1</sup> Although there is some variation, the general rule is that every state requires reporting of suspected child abuse or neglect by physicians and some classifications of healthcare providers for a child. However, for this reporting requirement to apply to healthcare providers reporting suspected child abuse or neglect during pregnancy, there must be some explicit requirement or intent for the state to include the pregnancy period. Moreover, drug use or exposure must be either explicitly or generally included as a trigger for abuse or neglect.

Because of the variability of conditions and intent amongst the states, it can be difficult for obstetricians to understand what their legal obligation is for reporting suspected child abuse or neglect. Although a positive urine drug test result confirming the presence of an illicit or non-prescribed controlled substance indicates maternal drug use and exposure to the unborn child, there can be confusion about whether this result must be reported to the state agency responsible for receiving reports of suspected child abuse or neglect. On the other hand, practitioners worry that if they report suspected child abuse or neglect when the state does not require a report, they may have liability for violating a patient's privacy rights. Anecdotal evidence indicates that many healthcare providers do not know what obligation they have, if any, to report suspected child abuse or neglect resulting from a positive urine drug test results in pregnant patients. In fact, conversations with employees at several state agencies that oversee the reporting of suspected child abuse and neglect indicate that there is frequently confusion regarding the legal requirements for reporting suspected child abuse and neglect by healthcare providers who suspect maternal drug use. Sadly, the confusion over the real obligations and requirements in contrast to the mythical obligations and requirements have frequently resulted in electing not to test at all on the theory that no information equals no suspicion to report. This "head in the sand" approach could expose healthcare providers to legal liability for failure to take reasonable steps to prevent harm to the unborn child, but more importantly denies the opportunity for

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<sup>1</sup> For purposes of this article, a "positive urine drug test result" means the presence of an illicit or non-prescribed controlled substance. For simplicity of language, this will exclude expected positive results where the urine drug test confirms the presence of a prescribed controlled substance.

early detection of fetal drug exposure.

This article attempts to succinctly summarize, in tabular form, the requirements for healthcare providers regarding reporting of maternal drug use identified through confirmed positive urine drug test results.

## Methodology

A review of current state laws and administrative rules was performed. The objective of the reviews were to identify:

1. The state definition of child abuse and neglect to determine whether the definition specifically addresses maternal drug use as child abuse or neglect;
2. The definition of a child to determine whether the
3. Whether the state specifically requires reporting maternal drug use during pregnancy as child abuse or whether it could be inferred from the definitions of child and abuse and neglect;
4. Whether the state mandates reporting by physicians and other health care providers of child abuse generally; and
5. Whether the state mandates reporting of suspected maternal drug use during birth or upon examination of an infant.

Following the review of state laws and administrative rules, the website for the state agency responsible for receiving reports of child abuse was reviewed to determine whether additional guidance could be obtained regarding the state's position regarding the reporting of suspected maternal drug use. After review of the website, a call was placed to the identified state agency to confirm the interpretation of the existing laws and administrative rules and to confirm that no laws or rules were overlooked.

## Explanation of the Columns

The five columns are broken down as follows:

### Column 1, Reporting required for suspected substance abuse during pregnancy:

Every state requires healthcare practitioners who suspect child abuse or neglect to report such instances to the state agency. However, only 2 states explicitly require reporting of suspected substance abuse as child abuse or neglect during pregnancy. This Column identifies the states in which a positive urine drug test would be evidence of substance abuse AND state law requires the healthcare practitioner who receives the report of the positive urine drug test to report that information as suspected child abuse or neglect to the state agency.

**Column 2, Child Abuse could include pregnancy:** Some states define a child as birth until age 18; other states define a child as under age 18. For those states that only have an upper limit, *i.e.*, age 18, it is possible that the state could argue that the definition of a child includes pregnancy. If the definition of a child includes pregnancy, then the abuse and neglect statutes could be interpreted to cover the period of pregnancy. Therefore, if a state interprets child abuse or neglect to include substance abuse by a female during pregnancy, then any healthcare practitioner who suspects substance abuse by a pregnant female resulting from a positive urine drug test would be obligated to report such substance abuse

as child abuse or neglect to the state agency. To be clear, the report would **only** be required if all of the following are met:

1. The state's definition of a child does not limit the beginning timeframe to birth;
2. Child abuse or neglect explicitly includes drug use or exposure by a parent OR includes language concerning the failure of a parent to provide general care, safety, nurturing, well-being, or similar requirement;
3. The state has publicly stated, through publication, prosecution or otherwise, its interpretation that child abuse or neglect includes non-prescribed or illicit use of controlled substances by a female during pregnancy;
4. State law requires reporting by a physician or other healthcare provider of suspected child abuse or neglect; AND
5. The physician or healthcare provider has reason to believe, through the use of a urine drug test or other mechanism, that the pregnant female is using non-prescribed or illicit controlled substances.

This column identifies those states in which the laws defining child COULD be interpreted by the state to include the pregnancy period. This column should be used in combination with either Column 4 or Column 5 to determine whether the use of illicit or non-prescribed controlled substances by a pregnant female COULD be interpreted by the state as meeting the definition of child abuse AND would therefore obligate the physician or healthcare provider to report suspected child abuse or neglect to the state agency for a positive urine drug test result.

**Column 3, Mandatory reporting for drug exposed infants:** Some states have a specific statute that requires physicians and other healthcare practitioners who are present at the birth of a child to report to the state agency if there is reason to suspect that the infant has been exposed to drugs, which would mean during pregnancy. These statutes may require urine drug testing or some other testing to determine whether the infant has been exposed to illicit or non-prescribed controlled substances. This column identifies the states that have an explicit requirement to report suspected drug exposure by a newborn infant.

**Column 4, Drug Exposure included in the definition of child abuse:** Some states explicitly state that exposure to drugs is considered child abuse or neglect. Whether such exposure applies to pregnancy depends upon whether the state's definition of a child could be interpreted to include the period of pregnancy, *i.e.*, the definition of a child only includes an upper limit of age 18. This column identifies the states in which the definitions of child abuse and neglect explicitly include exposure to drug use. This column should be used in connection with Column 2 to first identify states that COULD interpret child abuse or neglect to include pregnancy and second, to identify the states that explicitly include drug exposure in the definition of child abuse or neglect.

**Column 5, Definition of Child Abuse as a general failure to protect:** As noted above, some states include in their definition of child abuse or neglect more general, catchall language that includes the failure to care for, safeguard, nurture, protect, nourish, or other similar requirement. Similar to Column 4, whether this general requirement would apply to the pregnancy period depends upon whether the state's definition of a child could be

interpreted to include the period of pregnancy, *i.e.*, the definition of a child only includes an upper limit of age 18. This column identifies the states in which the definition of child abuse and neglect include a general failure to safeguard a child. Similar to Column 4, this column should be used in connection with Column 2 to first identify states that COULD interpret child abuse or neglect to include pregnancy and second, to identify the states that explicitly include drug exposure in the definition of child abuse or neglect.